MEL EPL Helpline

Inquiries

Presented By: David S. DeWeese, Esquire
The DeWeese Law Firm, P.C.
BURLCOJIF Retreat May 6, 2021

Family and Medical Leave Act (FMLA)

- The inquiry from the employer involved employees requesting leave under the Family and Medical Leave Act (FMLA) as a result of schools opening under a reduced, or in-person/virtual hybrid schedule and the question was whether that leave can be utilized intermittently.

- I advised the employer that based upon amendments made to the New Jersey Family Leave Act (NJFLA) as a result of the COVID-19 pandemic, employees are now permitted to take intermittent leave under NJFLA in certain circumstances.

- The employer was further advised that the amendments to the NJFLA allow for employees to take leave under the act for, among other reasons, in-home care or treatment of a child due to the closure of the child's school or childcare due to a pandemic or in an effort to prevent spread of a communicable disease. The amendments further state that if the leave is taken for the above stated reason, it may be taken intermittently if:
  1) the employee provides the employer with prior notice of the leave as soon as practicable; and
  2) the employee makes a reasonable effort to schedule the leave so as not to unduly disrupt the operations of the employer and, if possible, provide the employer, prior to the commencement of the intermittent leave, with a regular schedule of the day or days of the week on which the intermittent leave will be taken.


next exit
PAID
TIME OFF

Paid Time Off (PTO)

- The Employer sought guidance on New Jersey Temporary Disability Insurance and the use of Paid Time Off (PTO). The Employer had an employee coming off Workers' Compensation benefits who now has an unrelated injury for which the employee will continue to be out of work. Through the employee's attorney, the employee has requested to be paid all of his/her sick, vacation, and personal time while he/she is out for the injury. New Jersey requires Municipal Employers to provide a temporary disability program, and the employer advised that the Municipality's program is NJ TDI. NJ TDI requires an employee to use all accumulated sick time before TDI begins paying the employee, but the employee is not required to use vacation and personal time.

- Based upon the information provided by the employer, the following observations were made:

  1.) Is an employee required to use TDI when out for an illness or injury lasting more than five days?

  No, an employee is not required to use or apply for TDI when he or she is out of work for an illness and/or injury lasting five of more days of duration.

  2.) If an employee is not required to use TDI for an illness of injury lasting more than five days and does use benefit time, can we as the employer invoke the use of FMLA to coincide with this time period, or must we wait until after his/her benefit time is exhausted to invoke FMLA?

  My interpretation of the inquiry was "Can the employer "designate" the employee's time off as FMLA-qualifying, or do the elected paid leave days off "count" toward an employee's twelve week FMLA entitlement?"

PTO continued…

- When an employer determines that leave is for an FMLA-qualifying reason, the qualifying leave is FMLA-protected and counts toward the employee's FMLA leave entitlement. Even if an employee elects to use accrued paid leave (paid sick leave, vacation, personal, etc.) for a FMLA qualifying reason, the employee's paid leave counts toward his or her twelve week FMLA entitlement, and the use of paid leave cannot expand that entitlement.

- The employer was further advised that prior to designating the leave as FMLA-qualifying, the employer should ensure that the disability qualifies as a "serious health condition" under FMLA. To take FMLA leave for a "serious health condition", the employee must have an injury, impairment, illness, or physical mental condition that involves:

  1) Incapacity or treatment for a chronic serious health condition;

  2) Permanent or long-term incapacity for a condition for which treatment may not be effective;

  3) Incapacity due to pregnancy or prenatal care;

  4) Inpatient care at a hospital, hospice, or residential medical care facility;

  5) Multiple treatments for either restorative surgery following an accident or injury, or a condition that would require an absence of more than three days if not treated; or

  6) Incapacity for more than three full calendar days with continuing treatment by a health care provider.

Leave for Employee Injury

- This inquiry was related to an employee who was out of work based upon a work related injury, and that employee was collecting Workers' Compensation Benefits. The Municipality had a written policy which was contained in their Policies and Procedures Manual which provided that any employee who is out of work for sixty (60) consecutive days will no longer accrue sick and vacation days until they return to work. The inquiry was whether that policy would apply to an employee who is out of work based upon a work related injury.

- The Employer was advised that it was my opinion that there is no distinction between Workers' Compensation leave and leave for a non-work related injury or medical condition provided that there is a uniform policy articulated by the municipality on this issue. The Division of Workers' Compensation would not have any jurisdiction over this issue in any event. The only issue that the Division would have jurisdiction over would be whether or not the employee was entitled to temporary disability benefits for the lost time from work. The Division would have no jurisdiction to order the reinstatement of either sick or vacation days whether used or to be accrued.

Employee Injury continued…

- Generally, when an employee is entitled to temporary disability benefits and has used sick or vacation days for the time lost from work, the employee can administratively petition to have those days reinstated by an Administrative Law Judge but a Judge of Compensation has no authority to do so. In addition, the employer was advised that I am not aware of any law or decision that would compel the municipality to continue to accrue additional sick and/or vacation days past 60 days if that is the policy unless that issue is specifically governed by a collective bargaining agreement.

- Lastly, in 2018 the New Jersey Earned Sick Leave Law went into effect that requires employers of all sizes to provide workers with up to 40 hours of paid sick time per year to care for themselves or a family member. Employees accrue one hour of paid sick time for every 30 hours that they work, up to 40 hours per year. The employer may also advance the 40 hours or provide a prorated amount during the benefit year. Generally, you can begin taking earned sick leave 120 days after your first day of employment. The 120 day "waiting period" may be imposed by an employer, or the employer may let the employee use their sick time sooner. I advised that it was my understanding, however, that this law does not apply to public employees who already receive paid sick time (PTO) that meets the minimum requirements of the law.

Special Law Enforcement Officers (SLEOs)

- The Employer inquired with regard to the number of hours per week that Special Law Enforcement Officers (SLEOs) are permitted to work, and what are the potential consequences if their hours exceed the maximum permitted per week.

- After performing extensive research on the issue, my findings were as follows:

  A) N.J.S.A. 40A:14-146.16 provides that a SLEO shall not be employed for more than twenty (20) hours per week by the local unit with limited exceptions. Those exceptions are:

     1) In a resort municipality during any seasonal period which is inapplicable to this employer's circumstances; and
     2) During periods of emergency which is inapplicable to this employer's circumstances.

  B) The maximum of twenty (20) hours per week includes any and all work that is performed by a SLEO as law enforcement services, such as traffic control at a construction site.

SLEOs continued…

C) The **Affordable Care Act** and the IRS define a full time employee as one who works at least thirty (30) hours per week or 130 hours per month on average. The standard measurement is during a three to twelve month period, total hours worked divided by weeks worked to determine the average.

D) In New Jersey, an employer must offer or provide health insurance to its employees under the following circumstances:

1) Employers with fifty (50) or more employees must provide "minimum essential" health care coverage for employees who work thirty (30) or more hours per week.
2) Employers with two (2) to fifty (50) employees are not required to offer health care coverage to their employees. However, employers with two (2) to fifty (50) employees which elect to provide a health benefits plan must offer health benefits coverage under the plan to all employees who work twenty-five (25) or more hours per week.

E) The Affordable Care Act defines a "full-time employee" as an employee who, in any given month, works an average of at least thirty (30) hours per week.

F) Therefore, an employer that permits SLEOs to work the number of hours per week which would qualify them to be eligible to receive health benefits, subjects themselves to penalties under the Affordable Care Act and claims by the SLEOs for the employer to provide them with health benefits.

SLEOs continued…

G) In addition, if SLEOs are working hours in excess of the maximum number of hours permitted by N.J.S.A. 40A: 14-146.16, the municipality is vulnerable to claims by the Police Union (PBA) on behalf of their full time officers or claims by individual full time officers that the full time officers are being denied overtime based upon the illegal and improper use of the SLEOs.

H) I am aware that there are municipalities in the State of New Jersey that do not comply with N.J.S.A. 40A: 14-146.16; however, the risks of violating this law are significant since there are potential penalties that could be imposed and lawsuits that could be filed.

I) It is recommended that municipalities strictly comply with maximum hours permitted to be worked by a SLEO (20 hours per week) in order to avoid those substantial consequences, unless the exceptions in Paragraph A are applicable.

Fair Labor Standards Act (FLSA)

- The Employer was seeking clarification with regard to the status of Police Dispatchers under the Fair Labor Standards Act (FLSA) and the determination as to whether there are exemptions for forty (40) hour work week overtime regulations. The Employer indicated that the Dispatchers have a Collective Bargaining Agreement (CBA) which the Unit is looking to amend to allow for twelve (12) hour shifts and that the Employer is concerned that this amendment would violate the FLSA overtime regulations if the Dispatchers proposed new schedule would require forty-eight (48) hours for one of the two weeks in each pay period.

- I advised the employer that FLSA prevails over any contrary provision in a CBA to the extent that the CBA calls for lower compensation than mandated by the FLSA. FLSA provides the ground floor requirements, and employers must pay the Federal Overtime rate. A CBA may provide for a lower overtime rate than specified by the FLSA, but only if it defines "overtime" as something less than forty (40) hours per week; however, even in that circumstance, the employer must still pay overtime in accordance with the FLSA for all hours worked in excess of forty (40) hours in one week.

Per Diem & Part-Time Employees

- The inquiry by the employer involved a per diem/part time employee who was hired to work 29 hours or less per week; however, the employee is consistently being scheduled for more than 29 hours per week by their supervisor. I advised the employer that the distinction between a part time and a full time employee should be spelled out in the Municipality's Employee Manual and that the Municipality Employee Manual should designate the number of hours per week to be worked for an employee to be qualified as a full time employee. I advised that typically a full time employee is entitled to paid vacation, sick days, holidays, personal days, health benefits and retirement benefits.

- In addition, if a full time employee works over 40 hours per week, they are entitled to receive overtime pay of time and a half. Part time employees do not receive any of the benefits of a full time employee; however, if a part time employee is regularly working the same number of hours as a full time employee, depending upon the meaning of "on a consistent basis", the employee could assert a claim that they should be considered a "full time" employee, and therefore entitled to all of the benefits of being a "full time" employee. It was my opinion that this type of claim would not be successful; however, this issue should be addressed prior to it reaching that level. My suggestion was to define the meaning of a part time employee (maximum hours worked to be classified as part time) in the Municipality Employee Manual and require Municipal supervisors to abide by that definition when scheduling employees.

- The Employer inquired regarding an employee who had been out on a non-occupational related disability for six (6) months. The employee's disability was ending and the employer had been attempting to determine whether the employee would be returning to work, whether the employee was capable of returning to work, or whether the employee intended to file for permanent disability. The initial inquiry was whether the employer could force the employee to resign from their position based upon their refusal to respond to the employer's inquiries. The Employer inquired regarding the employee's eligibility for Long-Term Disability under the Public Employees' Retirement System (PERS) and what the employer's requirements were if the employee is accepted.

- As to the resignation issue, I advised the employer that they could not force the employee to resign. If the employee refuses to resign and the employee also refuses to have a Fitness for Duty exam performed, the employer could then consider the termination of the employee. However, any consideration of termination should be guided by Labor Counsel.

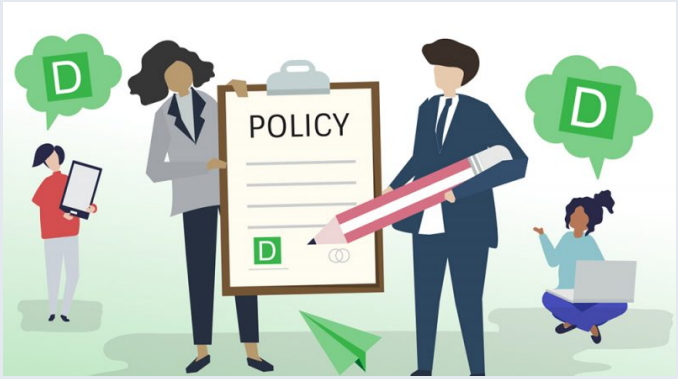
Disability Benefits continued…

- As to the employer's requirements if the employee is accepted into Long-Term Disability. The employee is eligible for up to six (6) months of coverage. The benefit may begin after six consecutive months of disability. If the employee is determined to be disabled (unable to perform duties of her regular occupation), the employee is eligible to receive a monthly benefit of 60% of the base salary. If the employee is eligible, the employer's mandatory contributions are paid for the member by the employer. An employee is determined to be totally disabled if the employee is still unable to engage in any gainful employment after being on long-term disability for eighteen (18) months. An employee who is disabled and receiving benefits under long-term disability remains eligible for employer provided health benefit coverage in the same manner as coverage is provided by the employer to retirees of PERS.

Employee Reimbursement

- The inquiry was made as to whether an hourly employee who participates in non-mandatory training which requires the employee to travel to the training, is entitled to be paid for the days that the training is attended. The Municipality had an Educational Benefits / Reimbursement Policy.

- The Employer was advised that it was my opinion that the aforementioned policy should be followed and applied consistently in all circumstances. There should be a written procedure developed which requires the employee to seek, in writing, prior approval for their attendance at the training, and then that request should be reviewed by the designated supervisor. The designated supervisor should then respond to the employee and advise them, in writing, whether or not the employee will be paid their hourly rate for the training that is attended and whether or not the expenses for the travel and training will be paid and/or reimbursed.



Medical Marijuana

- The Employer sought guidance on the use of medical marijuana by Municipal employees and the appropriate policies and procedures for the monitoring of that use.

- The Employer was advised that this area of law is very new and is still continuing to develop; therefore, to date, there are no definitive answers or direction that can be taken. The Employer was provided with a recent Superior Court of New Jersey, Appellate Division case captioned Wild v. Carriage Funeral Holdings; however, I advised the employer that this matter is currently pending review before the Supreme Court of New Jersey. I indicated that the Appellate Division in that case discussed the distinction between the New Jersey Compassionate Use Medical Marijuana Act and the New Jersey Law Against Discrimination.

- The Compassionate Use Act plainly states that "nothing in this act shall be construed to require…an employer to accommodate the medical use of marijuana in any workplace (N.J.S.A. 10:5-1 et seq., 24:61-14). However, the Appellate Division ruled that the Compassionate Use Act does not immunize actions that are potentially violative of the New Jersey Law Against Discrimination. Lastly, I advised the employer that the Supreme Court will be reviewing the Appellate Division decision and rendering their opinion; however, that opinion may not be issued for at least another six to nine months.

- The Employer was advised to have the Municipality's Labor Counsel involved in every decision that is made concerning the specific Municipal employee in question.

Tax Assessor Appointment

- The Employer sought guidance with regard to the position of Tax Assessor in the Municipality. My understanding was that the current Tax Assessor was appointed in 2016 and the initial four (4) year term would expire on June 30, 2020. The inquiry was whether the Municipality is required to reappoint the current Tax Assessor or whether someone else can be appointed.

- N.J.S.A. 40A:9-148 provides that the term of a Tax Assessor is for four (4) years which commences the first day of July next following their appointment. Tenure is obtained by any Tax Assessor who is appointed after the initial four (4) year term is completed. After a Tax Assessor has received tenure, they may only be removed for cause and the removal proceeding must occur before the Director of the Division of Taxation after due notice, N.J.S.A. 54:1-35.31; Mitchell v. Somers Point; 281 N.J. Super 492 (App. Div. 1994).

- Based upon the fact that the Tax Assessor of the Municipality is currently serving his/her initial term, he/she has not obtained tenure. Therefore, reappointment was not required.

Fire and Rescue Squad Participation

- The inquiry was regarding concerns involving volunteer Fire and Rescue Squad members being issued medical restrictions from doctors and concerns regarding their continued participation in meetings and fundraisers.

- I advised the employer that if the Doctor opines that the volunteer member cannot perform the job duties of a Firefighter or Rescue Squad member as described in the job descriptions, the volunteer can still be a member of the Volunteer Fire Company or Rescue Squad; however, they should be prohibited from performing any of the restricted activities. If attending meetings and participating in fundraisers is not prohibited by their Doctor, they can still attend and participate.

- In addition, I advised the employer that the Municipality should have specific written policies and procedures regarding the utilization of volunteers for Municipal work and Municipal sponsored events. The Municipality should, by Resolution, be specifically authorizing individuals, by name, to serve as "volunteers" and indicate in what capacity they will be serving, and then providing the Fund with a copy of the Resolutions. If the "volunteers" are properly designated, they should be subject to the same requirements as employees when returning to work from medical issues or injuries. The volunteers should be required to provide a Doctor's note or certification indicating that they are permitted to perform the work required of their "volunteer" status. The burden to provide that documentation should be placed on the volunteer.